SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 810.

THE UNITED STATES, APPELLANT,

vs.

C. W. PHELLIS.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Exhibit A. Tax receipt	6	4
B. Claim for abatement	6	4
C. Claim for refund	7	5
D. Rejection of claim	9	6
General traverse	12	8
Argument and submission of case	12	8
Findings of fact	13	8
Conclusion of law	24	21
Opinion by Booth, J.	24	21
Judgment of the court	27	23
Defendant's application for appeal	27	23
Allowance of appeal	27	23
Certificate of clerk	28	23

IN THE UNITED STATES COURT OF CLAIMS.

C. W. PHELLIS, CLAIMANT,
vs.
THE UNITED STATES, DEFENDANT.

Filed April 10, 1920.
No. 34554.

I. *Petition.*

Claimant respectfully shows to the court:

1. That he is a citizen of the United States and a resident of the city of Wilmington, State of Delaware.

2. That on or about the 1st day of September, 1915, he was the owner in his own right of two hundred and fifty (250) shares of the common stock of the E. I. du Pont de Nemours Powder Company, a corporation organized and existing under the laws of the State of New Jersey.

3. That in September, 1915, the stockholders of E. I. du Pont de Nemours Powder Company, a New Jersey corporation, caused a reorganization of the business of said company to be made. At that time the company had outstanding the following stocks and bonds:

294,271 shs. com. stock, par $100	$14,166,000 4½% 30-year bonds
160,686 shs. pfd. stock, par $100	1,230,000 5% mortgage bonds
454,957	$15,396,000

2 The business had been carried on for a great many years and in September, 1915, had as capital and accumulated surplus employed in the business of manufacturing and selling explosives about $95,000,000. The stockholders, substantially all assenting thereto, organized a new corporation under the laws of Delaware, under the name of E. I. du Pont de Nemours & Company, with an authorized capital of $240,000,000, divided into 1,600,000 shares 6% debenture stock and 800,000 shares common stock, both of the par value of $100 each.

All the assets and good-will of the old company were transferred as an entirety and as a going concern to the new company October 1, 1915, the new company assuming all the liabilities of the old company, except capital stock and funded debt. In return therefor the old company received $1,484,100 in cash to be used in the redemption of its outstanding 5% mortgage bonds, $59,661,700 par value in debenture stock of the new company of which $30,234,600 were to be used in taking up share for share, and dollar for dollar, the 160,686 shares of the preferred stock of the old company and the 14,166 4½% 30-year bonds then outstanding against said old company, and $58,854,200 par value of the common stock of the new company for immediate distribution among the stockholders of the old company.

The personnel of the stockholders, directors, and officers of the new company on the date of the transfer were the same as that of the old company. Upon receipt by the old company of the cash and stock aforesaid it distributed to its stockholders two shares of the common stock in the new company for each one share of common stock of the old company held by its stockholders respectively. The old company also proceeded to redeem in cash all its outstanding 5% mortgage bonds, and has by an exchange of debenture stock therefor taken up substantially all of its outstanding pre-
3 ferred stock and all but about $2,000,000 of its 4½% bonds. Since October 1, 1915, it has transacted no business other than that incidental to the redemption of its securities as aforesaid, and is now in process of liquidation.

4. Under the common stock distribution aforesaid the undersigned, a stockholder of the old company, received in October, 1915, 500 shares of the common stock of the E. I. du Pont de Nemours & Company at par, which stock so received the undersigned did not include as income in his income-tax return for said year, being advised that the same was a stock dividend and as such not liable to the income tax.

5. That the value of said stock of said E. I. du Pont de Nemours & Company of Delaware, so received by claimant as aforesaid, was three hundred and forty-seven dollars and fifty cents ($347.50) a share at the time of its receipt by claimant in October, 1915, as aforesaid.

6. That all the assets of said New Jersey corporation passed to said Delaware corporation in exchange for the capital stock of said Delaware corporation issued to the said New Jersey corporation and distributed to its stockholders as aforesaid.

7. That said New Jersey corporation retained as its only assets the debenture stock of said Delaware corporation to an amount equal to the outstanding common stock of said New Jersey corporation, and the value of said debenture stock was ninety-five dollars ($95) per share, and said New Jersey corporation ceased to do any business from the month of October, 1915, as aforesaid.

8. That upon the completion of the reorganization above set out each original holder of one share of the common stock of said New Jersey corporation retained one share of said stock and held two shares of the common stock of the Delaware corporation, the shares so held by him representing the same assets of the original cor-
4 poration then held by the Delaware corporation and while each stockholder had three certificates where he had before held one, the three certificates represented exactly the same value as the one had represented and the holder was by said reorganization and the holding of said certificates no richer than he had been before.

9. That the distribution of said stock of the Delaware corporation to the holders of said stock of the New Jersey corporation was in

substance and in fact a stock dividend and as such was not taxable under the provisions of the Sixteenth Amendment to the Constitution of the United States.

10. That notwithstanding the facts above set out the Commissioner of Internal Revenue, conceiving said distribution of the stock of the Delaware corporation to be a distribution of property and not a stock dividend, on or about the 31st day of December, 1919, made an assessment of an additional tax of $5,657.95 against said claimant, under the provision of the Act of Congress approved October 3, 1913, based upon the value of said stock so received by claimant of $173,750, or $347.50 per share.

11. That claimant thereupon filed claim for abatement, but on or about the 20th day of February, 1920, claimant withdrew his claim for abatement and paid to the Collector of Internal Revenue at Wilmington, Delaware, the sum of $5,657.95 in payment of said assessment, taking said collector's receipt therefor, of which copy is hereto attached, marked Claimant's "Exhibit A," and prayed to be read as a part hereof. That said payment was made by claimant under protest, addressed to said collector, copy thereof being hereto attached marked Claimant "Exhibit B" and prayed to be read as a part hereof.

12. That thereafter claimant filed with the Commissioner of Internal Revenue claim for the refund to him of said $5,657.95, paid by him under protest as aforesaid, copy of said claim being hereto attached, marked Claimant's "Exhibit C," and prayed to be read as a part hereof. That on or about the 20th day of March, 1920, said claim for refund was denied by the Commissioner of Internal Revenue, copy of his decision being attached hereto, marked Claimant's "Exhibit D" and prayed to be read as a part hereof.

13. That notwithstanding said denial of refund there is justly due to claimant the sum of $5,657.95, so paid by him as aforesaid under protest.

14. That claimant has always borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government. That he has not assigned his claim or any part thereof and that he is justly entitled to the amount herein claimed after allowing all just credits and offsets.

The premises considered: Claimant prays this honoroble court to enter judgment in his behalf against the defendant in the sum of $5,657.95, and for such other and further relief as may be required.

C. W. PHELLIS,
By FRANK S. BRIGHT,
His Attorney in Fact.

FRANK S. BRIGHT,
Attorney for Claimant.

DISTRICT OF COLUMBIA, *ss:*

Frank S. Bright, being first duly sworn, says that he is the duly appointed attorney in fact of C. W. Phellis, of Wilmington, State of Delaware, and as such has subscribed the foregoing petition, and that the statements therein made are true to the best of his information and belief.

FRANK S. BRIGHT,
Attorney in Fact of C. W. Phellis.

Subscribed and sworn to before me this 6th day of April, 1920.

KATHARINE A. GRACE,
Notary Public, D. C.

[SEAL.]

6

Form 1107

United States Internal Revenue

NOTICE TO TAXPAYER

Before presenting payment to cashier enter on this form—
(*a*) NAME
(*b*) ADDRESS
(*c*) FORM NUMBER OF RETURN
(*d*) AMOUNT OF TAX PAID

Claimant's Exhibit A

1915 Assessment by Commissioner

TAXPAYER'S RECEIPT FOR INCOME AND EXCESS PROFITS TAX

Office Collector Internal Revenue
Form No. of return_____ Tax, $5,657.95
Received payment,
H. T. GRAHAM
B.

Name: C. W. PHELLIS
Address: Wilmington, Delaware

Claimant's Exhibit B.

Wilmington, Delaware,
February 20, 1920.

H. T. GRAHAM, Esq.,
Collector of Internal Revenue,
Wilmington, Delaware.

SIR: I have heretofore received from you original notice and demand dated Dec. 31, 1919, for additional tax of $5,657.95 for the taxable year 1915, and against said assessment I have heretofore filed claim for abatement.

In order to get definitely settled at the earliest possible time my ultimate liability to pay said tax I have determined to withdraw my claim for abatement, pay the tax and file a claim for refund, and I am therefore handing you herewith check for $5,657.95 which I am paying to you under protest, for the reason that said assessment levies a tax under the provisions of the act of October 3, 1913, on 500 shares of the common stock of E. I. du Pont de Nemours & Company at the value of $347.50 per share received by me during the year

7 1915 as income, and said stock was not taxable income under the terms of said act of October 3, 1913, or any other statute applicable thereto, or within the terms of the sixteenth amendment to the Constitution, which provides for the collection of an in-

come tax. And claimant appends hereto copy of the statement of the circumstances of the issue and receipt of said stock that was appended to and made a part of claimant's return as originally filed, and respectfully shows that the circumstances thereof bring said distribution of stock well within the intent of the decision of the Supreme Court of the United States in the case of Towns v. Eisner, Collector, 245 U. S., 418, which declared stock dividends not to be taxable income.

I have to ask that receipt for the enclosed check may be returned to me forthwith.

Respectfully,

C. W. PHELLIS.

Encls.
P—

Claimant's Exhibit C.

(Copy.)

TREASURY DEPARTMENT
U. S. INTERNAL REVENUE
Form 46—Revised March, 1918
Ed. 150,000

CLAIM FOR REFUND.

Taxes Erroneously or Illegally Collected

Also Amounts Paid for Stamps Used in Error or Excess.

State of Delaware, }
County of Newcastle } *ss:*

IMPORTANT
This claim should be forwarded to the Collector of Internal Revenue to whom the tax was paid and must be accompanied by Collector's Receipt therefor.

C. W. PHELLIS,
Du Pont Bldg.,
Wilmington,
Delaware.

Date of filing to be plainly stamped here.

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete:

1. Business engaged in by claimant: Employee of E. I. du Pont de Nemours & Co.

2. Character of assessment or tax: Income tax for 1915, as per notice and demand, dated Dec. 31, 1919.

3. Amount of assessment or stamps: Five thousand six hundred fifty-seven and 95/100 ($5,657.95).

4. Amount now asked to be refunded (or such greater amount as is legally refundable): $3,657.95.

5. Date of payment of assessment or purchase of stamps: February ——, 1920.

Deponent verily believes that the amount stated in Item 4 should be refunded and claimant now asks and demands refund of said amount for the following reasons:

"Said assessment levies a tax under the provisions of the act of October 3, 1913, on 500 shares of the common stock of E. I. du Pont de Nemours & Company at the value of $347.50 per share received by me during the year 1915 as income, and said stock was not taxable income under the terms of said act of October 3, 1915, or any other statute applicable thereto, or within the terms of the sixteenth amendment to the Constitution, which provides for the collection of an income tax. And claimant appends hereto copy of the statement of the circumstances of the issue and receipt of said stock that was appended to and made a part of claimant's return as originally filed, and respectfully shows that the circumstances thereof bring said distribution of stock well within the intent of the decision of the Supreme Court of the United States in the case of Towne v. Eisner, Collector, 245 U. S., 418, which declared stock dividen ls not to be taxable income."

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for the refunding of the whole or any part of the amount stated in item 3.

Signed: C. W. PHELLIS.

Sworn to and subscribed before me this 20th day of February, 1920.
G. D. HOPKINS, *Notary Public.*

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)

9 *Claimant's Exhibit D.*

IT:CL
WLS
Mr. C. W. PHELLIS,
Du Pont Building,
Wilmington, Delaware.

SIR: Reference is made to your claim for the refund of $5,657.95 additional individual income tax for the year 1915.

You claim that the assessment of the additional tax was erroneous and illegal in that it was based upon an income of $173,750.00 represented by 500 shares of common stock of E. I. du Pont de Nemours & Co., of Delaware at the value of $347.50 per share received by you in 1915 which was not taxable income under the Act of October 3, 1913, and that "the circumstances thereof bring said distribution of stock well within the intent of the decision of the Supreme Court of the United States in the case of Towne vs. Eisner, Collector, 245 U. S., 418, which declared stock dividends not to be taxable income."

You submitted an individual income tax return for 1915 and were

assessed thereon an income tax of $90.04. Subsequently your accounts were investigated by a revenue agent who under date of August 30, 1919, reported that in October, 1915, you received 500 shares of the common stock of the E. I. du Pont de Nemours & Co., a Delaware corporation, as your proportionate part of a 200% dividend declared and paid by the E. I. du Pont de Nemours Powder Co., a New Jersey corporation, to its stockholders. The value of this stock dividend at the time you received it was $347.50 per share, or a total value of $173,750.00. In the preparation of your original income tax return, the income represented by this dividend was omitted therefrom.

The agent's report was audited and approved by this office resulting in the assessment and collection of the additional tax complained of.

The issue is whether the dividend in question, consisting of 500 shares of the common stock of the E. I. du Pont de Nemours & Co., of Delaware, declared and paid by the E. I. du Pont de Nemours Powder Co., of New Jersey, was income to you and subject to income tax under the act of October 3, 1913.

The facts as they appear from the bureau records are that on or about October 1, 1915, the E. I. du Pont de Nemours Powder Co., a New Jersey corporation, sold all of its corporate assets, including a large surplus accumulated practically entirely after the outbreak of the European war, to the E. I. du Pont de Nemours & Co., a Delaware corporation, organized in 1915, by substantially the same parties controling the New Jersey Co., receiving therefor stock of the Delaware Company, together with comparatively small amount of cash. The New Jersey Co., then declared and paid a dividend to its own common stockholders consisting of common stock of the Delaware Co., in the proportion of two to one; that is, for each share of common stock of the New Jersey Co., the stockholder received as a dividend two shares of stock of the Delaware Co. The New Jersey Co. did not at this time dispose of the entire amount of stock of the Delaware Co., but retained debenture stock of that company of par value equal to that of its own common stock outstanding. The stockholders of the New Jersey Co. did not surrender their stock in that company upon receipt of the dividend in stock of the Delaware Company, and it was not until January, 1918, that an opportunity was given by the New Jersey Company to make such exchange at which time the New Jersey Company declared a further dividend consisting of approximately 90% of the remaining debenture stock of the Delaware Company, which it had retained, and give its stockholders the option of exchanging their stock for the 10% yet remaining. The Delaware Company's common stock when distributed as a dividend of the New Jersey Co. had a fair market value of $347.50 per share, its par value being $100.00. The debenture stock of the Delaware Company had a fair market value at that time of about $95.00 per share, par value $100.00.

Since these two corporations were separate legal entities, the stock of the Delaware Company received by the New Jersey Company in exchange for all its assets is legally distinguishable from the
11 stock of the New Jersey Company, therefore, the distribution by the New Jersey Company, of the stock of the Delaware Company, as a dividend is not the distribution of a stock dividend and is not ruled by the case of Towne vs. Eisner. Neither was the distribution in the nature of a liquidating dividend for the reason that the New Jersey Company did not at the time of the sale nor immediately thereafter, dissolve but remained in existence retiring its bonds and preferred stock and as late as January, 1918, declared a further dividend out of its remaining assets consisting of more than $29,000,000.00 of the Delaware Company's debenture stock.

It is therefore held that the dividend in question was a distribution in specie of a portion of the assets of the New Jersey Company and is governed by the same rule applicable to a distribution of a like value in money.

Your claim for the refund of $5,657.95 additional individual income tax for 1915, is therefore hereby rejected.

Respectfully,

(Sgd.) PAUL F. MYERS,
Acting Commissioner.

ELM—4

12 II. *General traverse. Filed June 10, 1920.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and submission of case.*

On March 1, 1921, this case was argued and submitted on merits by Mr. Frank S. Bright and Mr. William A. Glasgow, jr., for the plaintiff, and Messrs. Assistant Attorney General Frank Davis, jr., and John M. Sternhagen, for the defendants.

13 IV. *Findings of fact, conclusion of law, and opinion of the court by Booth, J. Entered March 14, 1921.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact.

I.

Plaintiff, Charles W. Phellis, is a citizen of the United States and a resident of the city of Wilmington, State of Delaware.

II.

On and prior to September 1, 1915, the plaintiff was the owner of 250 shares of the common stock of the E. I. du Pont de Nemours Powder Co., a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the New Jersey corporation.

III.

On the 19th day of August, 1915, the following letter was sent to the stockholders of the said New Jersey corporation, and the proposal therein made was very shortly thereafter assented to by 89.7 per cent of the holders of the stock of said company:

WILMINGTON, DELAWARE, *August 19th, 1915.*

To the stockholders of E. I. du Pont de Nemours Powder Company:

The business of our company has greatly increased in volume so that it has become necessary to materially increase our capital to provide for proper and economical operation. Your officers have given the problem long and serious consideration with the result that the board of directors have approved a plan for the readjustment of its financial affairs, which plan may be briefly summarized as follows:

A new corporation to be known as E. I. du Pont de Nemours & Company will be incorporated under the laws of the State of Delaware, which company will have three classes of stock, viz, 6 per
14 cent cumulative *nonvoting* debenture stock, 6 per cent cumulative *voting* debenture stock, and common stock.

Except as to voting powers the rights of both voting and nonvoting debenture stocks shall be identical and the charter will provide:

Debenture shares shall bear cumulative dividends at the rate of 6 per cent per annum.

Debenture shares may be called for payment at $125 per share.

No mortgage or other specific lien may be placed upon the whole or any part of the property of the company without the consent of 75 per cent in amount of the total debenture stock outstanding except that this provision shall not apply to purchase money mortgages or to the assumption of mortgages or liens upon property purchased, nor shall it prevent the pledge for the purpose of securing cash to be used in the ordinary course of the business of the company of securities at any time held and owned by the company, provided such cash advances are secured on obligations of the company with maturities not more than three years from date hereof.

In case of dissolution (whether voluntary or involuntary) debenture shares shall have preference over the common stock on distribution of assets to the par amount thereof plus accumulated dividends.

The voting debenture stock shall have equal voting rights with the common stock.

The nonvoting debenture stock shall have no voting privileges except (*a*) in the event the company shall fail to pay any dividend thereon and such default shall continue for a period of six months, in which event the voting and nonvoting debenture stockholders shall have the sole right of voting to the exclusion of the common stockholders for the ensuing year and for each year thereafter until the company shall pay all accrued dividends on said debenture stock; and (*b*) in the event of the net earnings of the company in any calendar year amounting to less than 9 per cent on the amount of debenture stock issued and outstanding during such calendar year then the nonvoting debenture stockholders shall have equal voting rights with the voting debenture stockholders and with the common stockholders, which voting rights shall continue until the net earnings of the company for some future calendar year shall equal 9 per cent on the amount of debenture stock issued and outstanding in such future year.

This new corporation, E. I. du Pont de Nemours & Company of Delaware, will purchase all the assets and assume all the liabilities of our company and will pay therefor the sum of $120,000,000 as follows: $1,484,100 in cash; $59,661,700 par value in debenture stock; $58,854,200 par value in common stock. This will be all the stock that will be issued by E. I. du Pont de Nemours & Company at this time.

Upon the consummation of said sale and when our company has received the stock of E. I. du Pont de Nemours & Company an offer will be made to purchase the outstanding bonds and preferred stock of our company as follows:

(*a*) 5 per cent bonds (outstanding $1,230,000). This issue will be called for redemption under the provisions of the mortgage and paid for in cash.

(*b*) 4½ per cent bonds (outstanding $14,166,000). An offer will be made to purchase these bonds at par, payable in 6 per cent nonvoting debenture stock of E. I. du Pont de Nemours & Company at par. Thus, a person holding $1,000 par value 4½ per cent bonds will receive in payment therefor $1,000 par value 6 per cent debenture stock.

(*c*) Preferred stock (outstanding $16,068,600). Our 5 per cent preferred stockholders will be given opportunity to accept either of the following offers:

For each $100 par value of our 5 per cent cumulative preferred stock there will be offered $100 par value 6 per cent cumulative *nonvoting* debenture stock of E. I. du Pont de Nemours & Company. Thus, a person holding one share of preferred stock may exchange it for one share of debenture stock which will result in a 20 per cent increase in annual income; or

For each $100 par value of our 5 per cent cumulative preferred stock there will be offered $83 1/3 par value 6 per cent cumulative

voting debenture stock of E. I. du Pont de Nemours & Company with the privilege to the holder of this voting debenture stock of exchanging for nonvoting debenture stock at any time prior to April 25th, 1916, receiving therefor $100 par value nonvoting debenture stock for each $83 1/3 of voting debenture stock.

(*d*) Common stock (outstanding $29,427,100). All of the common stock of E. I. du Pont de Nemours & Company, of Delaware, will be distributed to the common stockholders of our company as a dividend. In other words, a person holding one share of common stock in our company will continue to hold it and in addition will receive two shares of the common stock of E. I. du Pont de Nemours & Company.

The above plan has been worked out as the result of the most mature deliberation, and we are confident that it will appeal to our security holders as most desirable.

We, therefore, request you to sign the attached form of assent to the carrying out of this plan, and return it to us at your earliest convenience, being careful to sign exactly as your name appears on your stock certificate.

Any information in connection with the matters herein referred to will be cheerfully furnished upon request.

Respectfully submitted.

PIERRE S. DU PONT,
President.

Assent of stockholders.

(To be signed and returned to P. S. du Pont, president.)

Whereas the board of directors of E. I. du Pont de Nemours Powder Company have approved a plan for readjusting the financial affairs of that company, which plan may be summarized as follows:

(*a*) A new corporation to be known as E. I. du Pont de Nemours & Company will be incorporated under the laws of the State of Delaware, which company will have three classes of stock, viz, 6 per cent cumulative *voting* debenture stock, 6 per cent cumulative nonvoting debenture stock, and common stock. Except as to voting powers, the rights of each class of debenture stock shall be identical and
16 shall be as follows: Cumulative six per cent dividends payable quarterly, with preference upon any distribution of assets to the extent of $100 per share and accumulated dividends in case of dissolution (whether voluntary or involuntary); the nonvoting debenture stock to have voting rights in common with the voting debenture stock, and to the exclusion of the common stock in case the company shall fail to pay any quarterly dividend thereon, and such default shall continue for a period of six months and to have equal voting rights with the voting debenture stock and common stock in case the earnings in any year shall amount to less than nine per cent of the amount of debenture stock issued and outstanding; both classes of debenture stock to be redeemable at any dividend date at $125 per

share; no prior lien to be placed upon any of the property of the corporation without the consent of three-fourths of the combined debenture stock, but this shall not apply to current obligations for the procurement of working capital, which obligations shall not run for more than three years from the date thereof.

(*b*) To sell, assign, convey, and transfer to E. I. du Pont de Nemours & Company all the assets of every nature of E. I. du Pont de Nemours Powder Company, subject to all the liabilities of that corporation, including its bonds issues, and subject to any lien or charge securing any of said obligations, all of which obligations shall be assumed by E. I. du Pont de Nemours & Company.

In consideration therefor the Delaware corporation to pay $1,484,100.00 in cash, 588,542 shares of the common stock, and 596,617 shares of the debenture stock of E. I. du Pont de Nemours & Company.

(*c*) The E. I. du Pont de Nemours Powder Company to redeem its five per cent bonds at 105 per cent in cash; to offer to the holders of its 4½ per cent debenture bonds ten shares of said nonvoting debenture stock for each $1,000 of said bonds; to offer to the holders of its preferred stock at their option either one share of said nonvoting debenture stock for each share of said preferred stock, or $83⅓ par value of said voting debenture stock for each share of said preferred stock, and in case the latter option is exercised will further, at any time prior to April 25th, 1916, exchange any such voting debenture stock for nonvoting debenture stock by giving therefor one share of nonvoting debenture stock for each $83⅓ par value of said voting debenture stock;

And, whereas, under the charter of said E. I. du Pont de Nemours Powder Company, the written assent of two-thirds in amount of the stockholders of said company is necessary to said sale, conveyance, assignment, and transfer of its property, assets, rights, and privileges as an entirety;

Now therefore we, the undersigned stockholders of E. I. du Pont de Nemours Powder Company, hereby assent, for and on behalf of all the stock in said corporation held by us respectively, to the sale, conveyance, assignment, and transfer of all the property, assets, rights, and privileges of said corporation as an entirety to E. I. du Pont de Nemours & Company hereinbefore referred to and for the consideration hereinbefore mentioned; and we further authorize the directors of said corporation to take such steps as may be necessary to carry out the same.

17 This assent, however, shall not become effective until such time as E. I. du Pont de Nemours & Company shall have been organized, and the board of directors of said E. I. du Pont de Nemours Powder Company shall have passed resolutions authorizing said sale, conveyance, assignment, and transfer, as above provided, for the consideration above mentioned, and further shall have authorized the offers of exchange of the said securities of the said E. I. du Pont de Nemours & Company to the 4½ per cent bondholders and the

preferred stockholders of said New Jersey corporation, and shall have authorized the redemption of said five per cent bonds of said corporation.

This assent may be executed upon separate forms with the same force and effect as though executed upon one instrument.

_____ _____.
(Sign here.)

In presence of—

_____ _____

Dated the _____ day of August, 1915.

IV.

As a result of said proposal and the assent thereto of said stockholders the plan set out in said proposal was carried out. The E. I. du Pont de Nemours & Co., a corporation, was organized under the laws of the State of Delaware (hereinafter called the Delaware corporation) and the following agreement between the New Jersey corporation and the Delaware corporation was entered into on the 16th day of September, 1915:

An agreement made this 16th day of September, A. D. 1915, by and between E. I. du Pont de Nemours Powder Company, a corporation organized and existing under the laws of the State of New Jersey, hereinafter called the "vendor," of the first part, and E. I. du Pont de Nemours and Company, a corporation organized and existing under the laws of the State of Delaware, hereinafter called the "company," of the second part:

Whereas the vendor is the owner of the real, personal, and mixed property hereinafter described, which property the board of directors of the vendor, with the written assent of the holders of more than two-thirds of the capital stock of the vendor issued and outstanding, has offered to sell and convey to this company, as an entirety and as a going concern, for one hundred and twenty million dollars ($120,000,000), payable in cash and in the capital stock of this company as follows: One million four hundred and eighty-four thousand one hundred dollars ($1,484,100) in cash; fifty-eight million eight hundred and fifty-four thousand two hundred dollars ($58,854,200) in the common stock of the company at par, and fifty-nine million six hundred and sixty-one thousand seven hundred dollars ($59,661,700) in debenture stock of the company, of which debenture stock one hundred thousand (100,000) shares or any part thereof shall be voting debenture stock if demanded by the vendor; and

Whereas the company has been duly organized with an authorized capital stock of two hundred and forty million dollars ($240,000,000)
18 divided into one million five hundred thousand (1,500,000) shares of nonvoting debenture stock; one hundred thousand (100,000) shares of voting debenture stock, and eight hundred thousand (800,000) shares of common stock of the par value of one hundred dollars ($100) each; and

Whereas the board of directors of the company have ascertained, adjudged, and declared that the real, personal, and mixed property aforesaid are of the fair value of one hundred and twenty million dollars ($120,000,000), and that the acquisition thereof is necessary for the business of the company and to carry out its contemplated objects:

Now, therefore, this agreement witnesseth:

1. That the vendor hereby agrees to sell, assign, transfer, and set over to the company, its successors and assigns, all its right, title, and interest in and to the following described property, to wit: All of the vendor's real, personal, and mixed property of every kind, nature, and description on the date of transfer and wheresoever situate, including water rights and all fixtures and appurtenances to real estate and easements therein; all manufacturing plants and machinery, tools, and appliances used in connection therewith; all raw materials, manufactured products, and partially manufactured product wheresoever situated; all accounts and bills receivable; all stocks and bonds and all claims, demands, judgments, and choses in action of every kind, nature, and description; all patents, applications for patents, trade-marks, trade names, trade secrets, brands, and copyrights; all cash on hand and moneys in bank and all personal property of every kind, nature, and description.

The above enumeration is not to be taken as excluding any property or property rights not specifically mentioned in the above enumeration, but all the vendor's property, assets, rights, and privileges, including the good will of the business, is intended to be included in said sale. The real, personal, and mixed property above described to be sold and conveyed subject to the lien or charge imposed by that certain indenture made and executed June 1, 1906, between the vendor and the Guaranty Trust Company, of New York, as trustees, to secure the payment of an issue of sixteen million dollars ($16,000,000), par value of four and one-half per cent (4½ per cent) thirty-year gold bonds issued by the vendor, of which issue fourteen million one hundred and sixty-six thousand dollars ($14,166,000) par value are now outstanding and unpaid and subject to any and all other liens, mortgages, charges, or encumbrances of whatsoever kind and nature existing on the date of said sale. The consideration for said sale to be paid by the company shall be one million four hundred and eighty-four thousand one hundred dollars ($1,484,100) in cash, fifty-eight million eight hundred and fifty-four thousand two hundred dollars ($58,854,200) in the common stock of the company at par; and fifty-nine million six hundred and sixty-one thousand seven hundred dollars ($59,661,700) in debenture stock of the company, of which debenture stock one hundred thousand (100,000) shares or any part thereof shall be voting debenture stock if demanded by the vendor; nonvoting debenture stock to be accepted in payment of the purchase price at par and voting debenture stock at one hundred and

twenty dollars ($120) per share, with the option in the vendor at any time prior to April 25, 1916, to exchange voting debenture stock for nonvoting debenture stock on the same basis: i. e., this company shall be entitled to receive one hundred shares of nonvoting debenture stock for each eighty-three and one-third shares of voting debenture stock surrendered on or before April 25, 1916. The company shall also, as a part of the consideration for the property and business so sold, assume all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, due or to become due, of the vendor existing on the date of said transfer, except capital-stock liability and the funded debt of the vendor, consisting of one million two hundred and thirty thousand dollars ($1,230,000) of the five per cent (5 per cent) first mortgage and collateral trust gold bonds of the vendor now outstanding and unpaid, and fourteen million one hundred and sixty-six thousand dollars ($14,166,000) of the four and one-half per cent thirty-year gold bonds of the vendor now outstanding and unpaid.

2. The company hereby agrees, in consideration of said sale and upon the execution by the vendor of this agreement and the delivery to it of a good and sufficient bill of sale assigning, transferring, and conveying all of the personal property and personal property rights aforesaid, to pay to the vendor the sum of one million four hundred and eighty-four thousand one hundred dollars ($1,484,100) in cash and to issue to the vendor or to such nominees as the vendor shall in writing hereafter direct, at such times and in such amounts as the vendor directs, certificates of stock of the company as follows: Five hundred and eighty-eight thousand five hundred and forty-two (588,542) shares of the common stock of the company and five hundred and ninety-six thousand six hundred and seventeen (596,617) shares of the debenture stock of the company, of which debenture stock one hundred thousand (100,000) shares or any part thereof shall be voting debenture stock is demanded by the vendor, said voting debenture stock to be exchanged for nonvoting debenture stock at any time prior to April 25, 1916, at the option of the vendor upon the basis of exchange hereinbefore set forth. All shares of the capital stock of the company so issued in payment for the property aforesaid shall be deemed to be and are hereby declared to be full-paid shares and not liable to any further call, and the holders of such stock shall not be liable to any further payment thereon.

The company hereby agrees, as a part of the consideration for the sale of the property and business so sold, to assume and discharge all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, due or to become due, of the vendor existing on the date of said transfer, except capital-stock liability and the funded debt of the vendor hereinbefore specifically mentioned; and the vendor hereby agrees to hold the company harmless from the lien or charge on the property sold to secure the payment of the funded debt aforesaid.

3. It is agreed that any contract of the vendor existing on the date of said transfer that is not legally assignable without the consent of the other party or parties thereto shall be assigned subject to the assent to such assignment of such other party or parties thereto and, in the event any such other party or parties shall not assent to the assignment of any such contract, the vendor shall perform or cause to be performed the said contract for the use and benefit of E. I. du Pont de Nemours and Company and at its sole expense, and all moneys due or thereafter becoming due thereon shall belong to the company.

4. The vendor hereby covenants and agrees with the company, upon the request and at the cost of the company, to execute and to do all such further assurances and things as shall reasonably be required by the company for vesting in it the property and rights agreed to be hereby sold, and giving to it the full benefit of this agreement.

In witness whereof the parties hereto have caused this agreement to be signed in their respective corporate names by officers duly authorized so to do and their respective corporate seals to be affixed on the day and year first above written.

E. I. DU PONT DE NEMOURS POWDER COMPANY,
By PIERRE S. DU PONT, *President.*

Attest:
L. R. BEARDSLEE, *Asst. Secretary.*

E. I. DU PONT DE NEMOURS AND COMPANY,
By IRENEE DU PONT, *President.*

Attest:
ALEXIS I. DU PONT, *Secretary.*

I, Alexis I. du Pont, secretary of E. I. du Pont de Nemours and Company, hereby certify that the foregoing is a full and true copy of an agreement between E. I. du Pont de Nemours Powder Company and E. I. du Pont de Nemours and Company, dated the 16th day of September, 1915, as taken from and compared with the original agreement on record in my possession.

Witness my hand and the seal of the company this 14th day of May, 1920.

[SEAL.] ALEXIS I. DU PONT.

V.

On October 1, 1915, said New Jersey corporation, by bill of sale in pursuance of said proposal of August 19, and said agreement of September 16, transferred to the Delaware corporation all its assets of every description, said bill of sale reading as follows:

Know all men by these presents:

That E. I. du Pont de Nemours Powder Company, a corporation organized and existing under the laws of the State of New Jersey, of the first part (hereinafter referred to as "vendor"), in considera-

COPY BOUND CLOSE

iton of the sum of one million four hundred eighty-four thousand one hundred dollars ($1,484,100) cash, and other valuable consideration to it in hand paid by E. I. du Pont de Nemours and Company, a corporation organized and existing under the laws of the State of Delaware, of the second part (hereinafter referred to as the "vendee"), receipt whereof is hereby acknowledged, has bargained, sold conveyed, transferred, assigned, and delivered, and by these presents does bargain, sell, convey, transfer, assign, and deliver unto the said vendee all of the vendor's property and assets, and all of the vendor's personal property and personal property rights of whatsoever kind, nature, and description, and wheresoever situate, including the good will of its business, and all its trade-marks, trade names, trade
21 secrets, brands, and copyrights; and all its machinery, tools, and appliances, in and in connection with its manufacturing plants and otherwise; and all its raw materials, manufactured product and partially manufactured product, wheresoever situate; and all accounts and bills receivable; and all its stocks and bonds; and all its claims, demands, judgments, choses in action, matured or otherwise, of every kind, nature, and description; all its patents and applications for patents; and all cash on hand and money in bank; and also all horses, mules, and live stock of every kind, nature, and description, wheresoever situate; and all transportation fixtures and equipment of every kind, nature, and description, including all locomotives, freight cars, tank cars, and track material; and all ships, boats, tugs, barges, and vessels of every kind, nature, and description, and wheresoever situate, including chartered or rented vessels. The foregoing enumeration is not to be taken as excluding any personal property or personal property rights not specifically mentioned in the above and foregoing enumeration, but all the vendor's personal property, personal assets, and personal rights and privileges is intended to be included in said sale: *Provided, however*, That all the above-described and intended property is sold and conveyed subject to the lien or charge imposed by that certain indenture made and executed June 1, 1906, between the vendor and the Guaranty Trust Company of New York, as trustee, to secure the payment of an issue of sixteen million ($16,000,000), par value of four and one-half per cent (4½ per cent) thirty-year gold bonds issued by the vendor, of which issue fourteen million one hundred sixty-six thousand dollars ($14,166,000) par value are now outstanding and unpaid, and subject to any and all other liens, charges, and encumbrances of whatsoever kind and nature existing on the first day of October, 1915.

To have and to hold all and singular the said property and property rights unto the said vendee, its successors and assigns, absolutely, to its and their own use and behoof forever.

It is understood that any contract of the vendor now existing that is not legally assignable without the consent of the other party or parties thereto is hereby sold and assigned subject to the assent of such other party or parties to such assignment, and in the event that

SE IN CENTER

any such other party or parties shall not assent to the sale and assignment of any such contract, the vendor shall and does hereby agree to perform or cause to be performed the said contract for the use and benefit of the vendee, but at the sole cost and expense of the vendee, and all moneys due or thereafter becoming due thereon shall belong to said vendee.

The vendee hereby agrees as a part of the consideration for the sale of the property and rights so sold to assume and discharge all the liabilities, debts, and obligations, contractual or otherwise, of every kind, nature, and description, of the vendor, existing on the first day of October, 1915, whether due or to become due, excepting capital stock and funded debt liability of the vendor.

The vendor hereby agrees to hold the vendee harmless from any lien or charge on the property hereby sold to secure the payment of the said funded debt of the vendee.

The vendor, for itself, its successors and assigns, hereby covenants and agrees with the vendee, its successors and asigns, that
22 upon the request but at the cost of the vendee it will execute any and all such further assurances as shall reasonably be required for vesting in the vendee, its successors and assigns, the property and right, hereby sold and giving to it and them the full benefit of this conveyance.

In witness whereof the parties hereto have caused these presents to be executed in triplicate by their respective officers thereunto duly authorized, and their respective corporate seals to be hereto affixed and attested as of the first day of October, A. D. 1915.

E. I. DU PONT DE NEMOURS POWDER COMPANY.
By PIERRE S. DU PONT, *President.*

Attest:
ALEXIS I. DU PONT, *Secretary.*

E. I. DU PONT DE NEMOURS AND COMPANY.
By H. M. BARKSDALE, *Vice President.*

Attest:
L. R. BEARDSLEE, *Asst. Secretary.*

I, Alexis I. du Pont, secretary of E. I. du Pont Nemours Powder Company, hereby certify that the foregoing is a full and true copy of a bill of sale conveying all of the personal property and personal property rights of E. I. du Pont de Nemours Powder Company to E. I. du Pont de Nemours and Company, which bill of sale is dated the 1st day of October, 1915, as taken from and compared with the original bill of sale on record in my possession.

Witness my hand and the seal of the company, this 14th day of May, 1920.

[SEAL.] ALEXIS I. DU PONT, *Secretary.*

Pursuant to said agreement of September 16, 1915, and upon the execution and delivery of said bill of sale from the New Jersey cor-

COPY BOUND CLOSE

poration to the Delaware corporation, and to carry out the terms of said agreement, the Delaware corporation delivered to the New Jersey corporation 588,342 shares of its common stock of the par value of $100 per share and 596,617 shares of its debenture stock of the par values of $100 per share and of the accepted value of $59,661,700, and said New Jersey corporation retained $1,484,100 in cash with which to redeem its outstanding 5 per cent debenture bonds.

VI.

In addition to said debenture stock of said Delaware corporation said New Jersey corporation then held cash in the sum of $1,484,400 sufficient to pay its outstanding 5 per cent bonds to the amount of $1,230,000. It also held debenture stock of the Delaware corporation to exchange for the outstanding preferred stock of the New Jersey corporation to the amount of $16,068,801.34 and to exchange for the outstanding 4½ per cent bonds of said New Jersey corporation to the amount of $14,166,000, and further, said New Jersey corporation held the debenture stock of the Delaware corporation equal in amount to the outstanding common stock of the New Jersey corporation, and it also held two shares of the common stock of the Delaware corporation for each share of its, the New Jersey corporation, common stock outstanding.

23

VII.

Upon the execution of said transfers, in pursuance of said proposal of August 19 and said agreement of September 16, the New Jersey corporation distributed as of October 1, 1915, to each holder of its common stock two shares of the common stock of the Delaware corporation, and the original holders of the common stock of the New Jersey corporation continued each to hold his original shares of said stock, and as of October 1, 1915, the Delaware corporation took over all the assets (excepting the aforesaid $1,484,100) theretofore held by the New Jersey corporation, and the New Jersey corporation thereafter held the cash and the debenture stock above described. Plaintiff received his 500 shares of the common stock of the Delaware corporation and continued to hold his original 250 shares of the common stock of the New Jersey corporation.

VIII.

The personnel of stockholders and officers of the two corporations was, on October 1, 1915, identical, the Delaware corporation having elected the same officers as the New Jersey corporation, and said holders of common stock of said corporations had each the same proportionate stock holding in both corporations; that is to say, on October 1 each owner of one share of stock of the New Jersey corporation was also the owner of two shares of stock of the Delaware corporation.

OSE IN CENTER

IX.

The New Jersey corporation has received as income upon the debenture stock of the Delaware corporation held by it against its capital stock dividends to the amount of 6 per cent per annum, which it has paid out to its preferred and common stockholders, including plaintiff.

X.

The New Jersey corporation, after the distribution of the stock of the Delaware corporation, continued as a going concern and is still in existence, but, except for the collection and payment of said dividends and the redemption of its outstanding bonds, and the exchange of debenture stock for its preferred stock and the holding of the debenture stock of the Delaware corporation to an amount equal to the outstanding common stock of the New Jersey corporation, said New Jersey corporation has done no business and is not in process of liquidation.

XI.

The fair market value of the stock of the New Jersey corporation on the 30th day of September, 1915, was $795 per share, and the fair market value of the stock of said New Jersey corporation, after the execution of the contracts between two corporations, was, on October 1, 1915, $100. The fair market value of the stock of the Delaware corporation, distributed as aforesaid, was, on October 1, 1915, $347.50 per share.

12 XII.

In making his income-tax return for the year 1915, plaintiff, upon the advice of counsel, did not include as income the 500 shares of stock of the Delaware corporation received by him as aforesaid, but attached a statement as to the receipt of said stock to his income-tax return stating he did not regard it as taxable income.

XIII.

After an investigation of his books the Commissioner of Internal Revenue, holding that the 500 shares of stock of the Delaware corporation was income, and that its market value when acquired by claimant, October 1, 1915, was $347.50 per share, assessed an additional tax against claimant upon the 31st day of December, 1919, for income claimed by him to be due from plaintiff for the year 1915 because of the receipt by him of said stock, said assessment being in the sum of $5,657.97. Plaintiff first filed a claim for the abatement of said assessment, but thereafter withdrew his said claim for abatement, and on February 20, 1920, paid to the collector of internal

COPY BOUND CLOS

revenue at Wilmington, Del., under protest, the amount of said assessment, to wit, $5,657.97, and upon the same day filed with the collector his claim for refund, which was denied by the Commissioner of Internal Revenue, whereupon plaintiff brought this suit.

Conclusion of law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that plaintiff is entitled to recover the sum of $5,657.97.

It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of five thousand six hundred and fifty-seven dollars and ninety-seven cents ($5,657.97).

Opinion.

BOOTH, *Judge*, delivered the opinion of the court:

The plaintiff was the owner of 250 shares of the E. I. du Pont de Nemours Powder Co., a New Jersey corporation. In September, 1915, a complete reorganization of the business of the company took place, and as the result of the same the plaintiff found himself the owner of his original shares in the New Jersey corporation and 500 shares in the new Delaware corporation. The defendants treated the new 500 shares of stock in the Delaware corporation as income, and assessed against them at their fair market value an income tax of $5,657.97, which plaintiff paid under protest. The facts are in no wise controverted and the findings disclose the exact situation.

In *Eisner* v. *Macomber*, 252 U. S., 189, 207, the Supreme Court, speaking of income, said:

"The gain derived from capital, from labor, or from both combined, * * * profit gained through a sale or conversion of capital assets, * * * not a gain accruing to capital, not a growth or increment of value in the investment, but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived,' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit, and disposal—that is, income derived from property. Nothing else answers the description."

Again, in the same case the Supreme Court used the following language (p. 206):

"In order, therefore, that the clauses cited from Article I of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress can not by any definition it may adopt conclude the matter,

LOSE IN CENTER

since it can not by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised."

Subjecting the facts herein to the rule announced, we find as the admitted status the following situation, viz: On September 30, 1915, the plaintiff's 250 shares in the New Jersey corporation were worth on the market $795 each, or the total sum of $198,750. On October 1, 1915, the day he received his 500 shares additional in the new Delaware corporation, his 250 shares in the New Jersey corporation decreased in value $695 a share, and were then marketable at $100 per share, while the 500 new shares he received were worth in the open market $347.50 each, or a total value of $173,750. Adding this amount to the decreased value of his New Jersey corporation stock, we find the plaintiff in exactly the same situation as to the value of his holdings in both corporations that he was prior to the reorganization. The figures indisputably demonstrate that by the transaction the plaintiff did not gain or lose a penny, as will with more precision appear from the following tabulation:

Sept. 30, 1915, 250 shares of stock of the New Jersey corporation, at $795 each	$198,750
Total value Sept. 30, 1915	198,750
Oct. 1, 1915, 500 shares of stock of the Delaware corporation, at $347.50	173,750
Oct. 1, 1915, 250 shares of stock of the New Jersey corporation, at $100	25,000
Total value of the 750 shares in both	198,750

As a matter of fact if the position of the defendants is to be sustained the plaintiff herein instead of receiving an income from the transaction loses $5,657.97 which he must pay from gains derived from a source other than the one in controversy, or out of his original investment.

The defendant contends that the New Jersey and Delaware corporations must be regarded as "separate and distinct legal entities" and that the case is within the rule of *Peabody* v. *Eisner*, 247 U. S. 347. We think the whole transaction is to be regarded as merely a financial reorganization of the business of the company and that this view is justified by the power and duty of the court to look
26 through the form of the transaction to its substance. In *Eisner* v. *McComber*, 252 U. S., 189 at 213, it is said:

"We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable without apportionment."

It seems incredible that Congress intended to tax as income a business transaction which admittedly produced no gain, no profit, and hence no income. If any income had accrued to the plaintiff by reason of the sale and exchange made it would doubtless be taxable.

COPY BOUND CLOS

Judgment will be awarded plaintiff in the sum of $5,657.97. It is so ordered.

Graham, *Judge;* Hay, *Judge;* Downey, *Judge;* and Campbell, *Chief Justice*, concur.

27 V. *Judgment of the court.*

At a Court of Claims held in the city of Washington on the fourteenth day of March, A. D. 1921, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order, adjudge, and decree that C. W. Phellis, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of five thousand six hundred and fifty-seven dollars and ninety-seven cents ($5,657.97).

By the Court.

VI. *Defendant's application for and allowance of an appeal.*

From the judgment rendered in the above-entitled cause on the 14th day of March, 1921, in favor of the claimant, the defendants, by their attorney general, on the 17th day of March, 1921, make application for, and give notice of, an appeal to the Supreme Court of the United States.

Annette Abbott Adams,
Assistant Attorney General.

Filed, March 17, 1921.

Ordered: That the above appeal be allowed as prayed for.

By the Court.

March 17, 1921.

28 Court of Claims.

C. W. Phellis
vs.
The United States. } No. 34554.

I, F. C. Kleinschmidt, assistant clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law; of the opinion of the court by Booth, J.; of the judgment of the court; of the defendant's application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 18th day of March, A. D., 1921.

[seal.]

F. C. Kleinschmidt,
Assistant Clerk Court of Claims.

(Indorsement on back:) File No. 28,167, Court of Claims. Term No. 810. The United States, appellant, vs. C. W. Phellis. Filed March 19th, 1921. File No. 28,167.

○

LOSE IN CENTER